

## Growing IRS Reliance On Informal Guidance Sows Uncertainty

By Eric Kroh

*Law360, New York (August 6, 2015, 5:55 PM ET)* -- As the Internal Revenue Service's funding continues to dwindle and its workload swells, confusion caused by the agency's increasing reliance on so-called informal guidance to instruct taxpayers on how to comply with tax laws will only get worse, experts said.

Pressed for resources, the IRS is scrambling to give taxpayers instructions on implementing changes in law, and it has done so by issuing more informal guidance such as notices and FAQs, leaving tax practitioners uncertain about how much they can rely on the communications and whether they will hold up in court, experts said.

"It's almost like they're putting out fires," Jennifer A. Ray, a partner in Crowell & Moring LLP's tax group, said.

IRS Commissioner John Koskinen has warned that the agency would have to pare back its guidance as a result of the budget cuts and the IRS has followed through.

Last week, the IRS released the initial version of its 2015-16 priority guidance plan, a list of issues agency lawyers say are in critical need of being addressed through regulations or other guidance during the year. The updated plan contains 277 projects, which may seem voluminous but represents a contraction compared to previous years.

The initial version of the 2014-15 priority guidance plan included 317 projects, meaning the number of projects declined some 13 percent in the intervening year. That is in sharp contrast with previous years. The last time the list contained fewer than 300 items was almost a decade ago in 2006-07, when there were 264 projects on the plan.

Koskinen insists that delivering projects on the guidance plan remains a priority of the agency but has conceded that regs writers might need to focus more on issues involving individual taxpayers filing Form 1040 and less on those affecting specialized businesses.

The result is the IRS puts out guidance more and more in informal ways such as through FAQs posted to the agency website, according to tax attorney Robert S. Horwitz. For example, the agency's offshore voluntary disclosure program, in which taxpayers can declare previously undisclosed offshore accounts in exchange for reduced penalties, has been rolled out almost entirely in the form of FAQs, Horwitz said.

The problem with FAQs is that the agency can change them without notice and without leaving an

archive of previous versions, Horwitz said. Unless someone prints out each version of an FAQ, he can't demonstrably show what was in it. Also, unlike some other kinds of IRS guidance, there is no contact information listed on FAQs, making it harder to know whom to call to find out further information, he said.

The IRS has not been clear about whether the FAQs are binding on the agency, putting taxpayers and practitioners in a real jam, Horwitz said. For issues in which the only guidance given by the IRS has been an FAQ, taxpayers don't know whether they can rely on them in disputes with the agency, he said.

"I would assume that if someone is assessed a negligence penalty and they show that they relied on an FAQ posted on IRS website, the IRS would agree that they weren't negligent if there was no other guidance, but God only knows," Horwitz said.

In some cases, the IRS releases notices saying it intends to put out regulations on controversial tax issues but then takes its time in getting around to writing the regulations, if it ever does. For example, last year the agency said it would issue additional regulations to clamp down on inversions by U.S. companies but it has yet to do so.

Another example is the investment and production tax credits for renewable energy property that are typically renewed every one or two years in the package of tax extenders, Ray said. The IRS has issued guidance on the credits only in the form of notices and there is no indication that full regulations are forthcoming, she said.

The notices don't have the force of a full regulation, but sometimes that is all taxpayers have to go on, leaving them uncertain about what the IRS' position is, Ray said.

"It does seem like it's getting worse," Ray said.

Ongoing taxpayer challenges to informal guidance could clarify questions about the force of law the guidance carries and how much deference it should be granted by courts, Ray said. A recent decision in the U.S. Tax Court could also help matters, she said.

Last week, the Tax Court sided with chipmaker Altera Corp. in a challenge to an IRS final rule requiring cost-sharing agreements to include the costs of stock-based compensation, saying the regulation was invalid because it failed the Administrative Procedure Act's arbitrary and capricious standard, the first time the court had applied the standard to IRS regs.

Tax practitioners are wondering if informal guidance is susceptible to similar attacks, according to Ray.

"What we're thinking about is whether these notices are open to challenge under the APA," she said.

--Editing by Chris Yates and Kelly Duncan.